

1 SAMUEL CASTOR, ESQ.
2 Nevada Bar No. 11532
3 ANNE-MARIE BIRK, ESQ.
4 Nevada Bar No. 12330
5 **SWITCH, LTD.**
6 7135 South Decatur Blvd.
7 Las Vegas, Nevada 89118
8 Telephone: (702) 444-4111
9 policy@switch.com

10 MARK A. HUTCHISON
11 Nevada Bar No. 4639
12 JACOB A. REYNOLDS
13 Nevada Bar No. 10199
14 PIERS R. TUELLER
15 Nevada Bar No. 14633
16 **HUTCHISON & STEFFEN, PLLC**
17 Peccole Professional Park
18 10080 West Alta Drive, Suite 200
19 Las Vegas, Nevada 89145
20 Telephone: (702) 385-2500
21 *Attorneys for Plaintiff*

22 **UNITED STATES DISTRICT COURT**

23 **DISTRICT OF NEVADA**

24 SWITCH, LTD., a Nevada limited liability
25 company,

26 CASE NO.: 2:17-cv-02651-GMN-EJY

27 **PLAINTIFF'S MOTION TO COMPEL
28 THIRD-PARTY JONES LANG
LASALLE TO PROVIDE
REQUESTED DOCUMENTS**

vs.
29 Plaintiff,

30 STEPHEN FAIRFAX; MTECHNOLOGY; and
31 DOES 1 through 10; ROE ENTITIES 11 through
32 20, inclusive,

33 Defendants.

34 COMES NOW Plaintiff, SWITCH, LTD., by and through its attorneys of record, Samuel
35 Castor, Esq., and Anne-Marie Birk, Esq., moves to compel third-party Jones Lang LaSalle
36 (hereinafter "JLL") to provide documents in response to the subpoena. In the alternative, Switch
37 moves for an order to show cause why JLL should not be held in contempt for its failure to comply
38 with a subpoena. Switch also moves for an award of the fees and costs associated with bringing this

1 motion.

2 Counsel did meet and confer with Counsel for JLL on October 25, 2019, and JLL confirmed
 3 that no documents would be provided with in response to the Switch subpoena. Switch confirmed
 4 with Counsel for JLL that Switch would be filing this Motion to Compel based on its failure to
 5 provide documents. *See* Decl. of Sam Castor, **Exhibit 1**.

6 **1. Factual background.**

7 Switch filed a complaint generally alleging that Defendant Fairfax misappropriated trade
 8 secrets learned about Switch for the benefit of Defendant and a third-party national competitor,
 9 Aligned Data Centers. (ECF No. 1-1 at 4:18-28). This misappropriation was made possible as
 10 Defendant Fairfax inspected the Switch facility and designs, in 2011 and 2015 while conducting a
 11 risk assessment for Switch's customers. (*Id.* at 12:20-21, 31). To conduct this inspection, Mr. Fairfax
 12 entered into Nondisclosure Agreements with Switch. *See* **Exhibit 2**.

13 Despite the Nondisclosure Agreements, Defendants provided Switch's trade secrets to third
 14 parties, including Aligned, Aligned Energy¹, and Inertech ("one of Aligned's companies"), who used
 15 this information in designing their own data centers with Fairfax's help. (*Id.* at 4:24-5:20, 16:1). As a
 16 result of Defendant Fairfax misappropriation of trade secrets, Switch lost several large clients to
 17 Aligned Data Centers.

18 JLL is a global real estate services firm dealing with data centers. *See* Declaration of Sam
 19 Castor, attached as **Exhibit 1**. JLL has offices nationally, including two offices in Las Vegas and
 20 regularly transacts business within Clark County. *Id.* at ¶5; *see* Printout of JLL's website, attached as
 21 **Exhibit 3**. Through its own research and business dealings, Switch has discovered that JLL has
 22 relationships with Defendants and third-party entities discussed in this case, and is financially
 23 interested in luring customers away from Switch with Switch's own technology. **Exhibit 1**.

24 JLL has provided services to eBay, the Switch customer that Fairfax conducted a risk
 25 assessment for, regarding eBay's data centers. **Exhibit 1**; *see also* Printout of JLL Data Center
 26 Solution's website, attached as **Exhibit 4**. Mark Bauer, National Director at JLL, serves as a broker
 27 to Rich Reyher, who formerly served as Chief Engineer at eBay and oversaw construction of one of

28 ¹ "Upon information and belief, Aligned is the parent company of Aligned Energy." (ECF No. 1-1 at 15:18-19).

1 their data centers. **Exhibit 1**; *see also* Printout of 7x24 Exchange's website, attached as **Exhibit 5**.
 2 Rich Reyher is currently Senior Director of Global Data Center Services of PayPal, who is also a
 3 customer of Switch. **Exhibit 1; Exhibit 5**.

4 JLL has also provided services to Aligned. **Exhibit 1**; *see also* Aligned Data Center's brochure,
 5 attached as **Exhibit 6**; *see also* Aligned Energy's brochure, attached as **Exhibit 7**. JLL has helped
 6 Aligned find customers for its data centers, including the data center in Phoenix, Arizona. **Exhibit**
 7 **1; Exhibit 6; Exhibit 7**.

8 Uber is a customer at Aligned's Phoenix, Arizona data center. **Exhibit 1**; *see also* Printout of
 9 Aligned Energy's website, attached as **Exhibit 7**. Aligned's Phoenix, Arizona data center is listed by
 10 JLL and is one of the data centers at issue in this case, as Switch believes the data center incorporates
 11 Switch's trade secrets that were misappropriated by Defendants. **Exhibit 1**. JLL's advertising for the
 12 Phoenix, Arizona data center includes a quote from Fairfax regarding the center's cooling and power
 13 generation platforms. It is Switch's position that Aligned Data Centers have implemented Switch's
 14 trade secrets in the design of their data centers **Exhibit 1; Exhibit 7**.

15 JLL's connections in the data center industry make it very likely that JLL has information that
 16 is relevant to this case. **Exhibit 1**. JLL has actively attempted to persuade Switch's customers and
 17 relocate with Switch's national competitors. JLL has a materially aligned financial relationship with
 18 Fairfax and the entities that gained access to Switch's trade secrets through Fairfax. JLL's
 19 communications with any of these entities relating to Switch likely contain information regarding
 20 Switch's claims and Defendants' defenses in this case.

21 As part of discovery in this matter and in order to obtain information regarding Defendant's
 22 actions in misappropriating Switch's trade secrets and selling those secrets, JLL was served with a
 23 subpoena on July 24, 2019. *See Exhibit 8*. The subpoena served requested communications between
 24 JLL and the following entities: MTechnology, Stephen Fairfax, Inertech, Uber, eBay, PayPal, Aligned,
 25 and Aligned Energy. Each of these requests were specifically narrowed to only include information
 26 regarding Switch. *Id.*

27 As detailed above, the communications sought by Switch are based on financial interest
 28 connections JLL has between the seven entities, the facts of this case, and JLL:

- 1 1. MTechnology and Fairfax are Defendants in this case. JLL has helped market data
2 centers designed by Fairfax, including the Phoenix, Arizona data center at issue in
2 this case.
- 3 2. Inertech is one of Aligned's companies. Aligned used Fairfax's services in
4 designing its data centers, which JLL helped market.
- 5 3. Uber is a customer at Aligned's Phoenix, Arizona data center, which JLL helped
5 market.
- 6 4. eBay retained Fairfax to tour Switch's facility, where Fairfax was able to obtain
7 Switch's trade secrets. JLL's National Director serves a broker to eBay's former
7 Chief Engineer.
- 8 5. PayPal is a customer of Switch. Its Senior Director of Global Data Center Services
9 is the same former Chief Engineer of eBay (Rich Reyher) that uses JLL's National
9 Director as a broker.
- 10 6. Aligned used Fairfax's services in designing its data centers, which JLL helped
11 market.
- 12 7. Aligned is the parent company of Aligned Energy.

14 On September 19, 2019² JLL objected to the *subpoena duces tecum*. These objection to each
15 request was identical and non-specific:

16 Incorporating herein and reasserting the General Objections above, JLL objects to this
17 Request on the grounds that it seeks discovery that is properly obtained from the
17 parties to this action. JLL objects to this Request on the grounds that it expressly calls
18 for the production of confidential and trade secret information, it is not reasonably
18 limited in time or in subject matter, and, for that reason, is unduly burdensome. JLL
19 is willing to meet and confer regarding this request.

20 **Exhibit 9.**

21 Based on these objections, JLL refused to provide any documents.

22 In response to JLL's objections, Switch affirmed to JLL that the *subpoena duces tecum* was "a
23 reasonable discovery exercise to evaluate what we view as a clear nexus between JLL, Fairfax and
24 Aligned." *See* Email chain between Switch and JLL, **Exhibit 10**. Switch's offered to explore search
25 terms and hit results to promote efficiency for both sides. *Id.* Though Switch followed up with JLL
26 twice, JLL did not respond to this offer. **Exhibit 1; Exhibit 10.**

27
28 ² It should be noted that Counsel for Switch provided JLL with an extension to produce the documents as in house
counsel for JLL, Helen Arnold, indicated that she was getting married and needed the extension.

1 Switch has also provided a copy of this Motion to JLL on February 12, 2020.

2 **2. Certification under LR II 26-7(c).**

3 As required by LR IA 1-3(f) and LR 26-7(c), Switch has made a good faith effort to meet and
4 confer prior to filing this motion through numerous email and telephone conferences. The time,
5 place, manner, and participants to these communications are detailed in the emails attached in
6 **Exhibit 10** and in the Declaration attached as **Exhibit 1**. Specifically on October 25, 2019 Sam Castor
7 and Piers Tueller on behalf of Switch as well as Michael Berta and Joseph Farris on behalf of JLL
8 conducted an in depth Meet and Confer but were unable to reach a resolution. JLL's counsel was
9 provided with a copy of this motion on March 13, 2020. *See Exhibit 1*.

10 **3. Legal Discussion.**

11 “Third-party discovery is subject to the overriding limitation of relevance established in Rule
12 26(b)(1).” *Scientific Games Corporation v. AGS LLC*, 2017 WL 3013251, at *2 (D. Nev., 2017). Switch
13 “may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or
14 defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1). Though the Court must
15 take proportionality into account, “relevance remains broad in scope.” *Riverport Ins. Co. v. State Farm*
16 *Fire & Cas. Co.*, No. 2:18-cv-00330-GMN-NJK, 2018 WL 6435883, at *2 (D. Nev. Dec. 6, 2018). “In
17 the context of a motion to compel, the party resisting discovery carries the heavy burden of showing
18 why discovery should be denied.” *Eruchalu v. U.S. Bank, Nat. Ass’n*, No. 2:12-CV-1264-RFB-VCF,
19 2014 WL 4546800, at *1 (D. Nev. Sept. 12, 2014) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429
20 (9th Cir.1975)).

21 **A. This Court is the proper venue for this Motion to Compel.**

22 Under Federal Rule of Civil Procedure 45(c)(2), “A subpoena may command: (A) production
23 of documents, electronically stored information, or tangible things at a place within 100 miles of
24 where the person resides, is employed, or regularly transacts business in person.” “At any time, on
25 notice to the commanded person, the serving party may move the court for the district where
26 compliance is required for an order compelling production or inspection.” Fed. R. Civ. P.
27 45(d)(2)(B)(i).

28 ///

1 JLL has two offices in Las Vegas and regularly transacts business within Clark County.
2 **Exhibit 1; Exhibit 3.** The subpoena requested production to take place at counsel for Switch's office
3 within Las Vegas. **Exhibit 8.** Therefore, this motion to compel is properly brought before this Court.

4 **B. Switch's discovery requests to JLL are proportional to the needs of the case.**

5 JLL asserts that its communications with MTechnology, including Stephen Fairfax, regarding
6 Switch are "properly obtained from the parties to this action." **Exhibit 9.** "[T]he court must limit the
7 frequency or extent of discovery ... if it determines that...the discovery sought...can be obtained
8 from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ.
9 P. 26(b)(2)(C).

10 Discovery from Defendants has proceeded slowly in this case. The Court recently issued a
11 Stipulated Amended Discovery Plan and Scheduling Order to address a "discovery impasse" the
12 parties were able to address with a contemporaneously filed protective order. (ECF No. 65 at 2).
13 Defendants have yet to engage in meaningful production of documents, as the parties are scheduled
14 to respond to outstanding discovery requests on December 20, 2019. (*Id.* at 4). Therefore, it is
15 currently impossible to determine what documents Defendants have and will be able to produce.

16 Even should Defendants have some communications sent to JLL regarding Switch from the
17 relevant timeframe, it is not clear that JLL's records would have the exact same communications. *See*
18 *Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 697 (D. Nev. 1994) ("documents actually
19 maintained in the files of each entity may not be identical"). Communications can be lost or deleted
20 by one individual or entity and saved by another. Switch should be permitted to retrieve
21 communications from both Defendants and JLL to compare the results and ensure their
22 completeness and accuracy.

23 In addition, JLL's objections and subsequent communications with Switch have failed to
24 establish that JLL will be significantly burdened by responding to Switch's subpoena duces tecum. It
25 should be a relatively straightforward matter for JLL to search for communications from a certain
26 source or domain and filter their results by whether the communication relates to Switch. JLL has
27 not explained how searching for these communications will be burdensome. "[C]onclusory and
28 speculative statements of harm, inconvenience, and expense...do not justify quashing [a] subpoena].

1 *Playstudios, Inc. v. Centerboard Advisors, Inc.*, No. 2:18-cv-1423-JCM-NJK, 2019 WL 6493926, at *5 (D.
 2 Nev. Dec. 3, 2019). The communications sought be Switch are relevant to determine what JLL told
 3 customers and business associates regarding Switch during the period when Defendants, who have
 4 associated with JLL, were misappropriating Switch's trade secrets. Therefore, JLL should be
 5 compelled to produce the documents sought in the subpoena duces tecum.

6 **C. The subpoena does not expressly call for production of confidential and trade
 7 secret information.**

8 “To protect a person subject to or affected by a subpoena, the court for the district where
 9 compliance is required may, on motion, quash or modify the subpoena if it requires: (i) disclosing a
 10 trade secret or other confidential research, development, or commercial information.” Fed. R. Civ.
 11 P. 45(d)(3)(B). “A person withholding subpoenaed information under a claim that it is privileged or
 12 subject to protection as trial-preparation material must...describe the nature of the withheld
 13 documents, communications, or tangible things in a manner that, without revealing information itself
 14 privileged or protected, will enable the parties to assess the claim.” Fed. R. Civ. P. 45(e)(2).

15 JLL asserts that each request with in the subpoena “expressly calls for the production of
 16 confidential and trade secret information.” **Exhibit 9**. However, the requests simply ask for
 17 communications with various entities—the requests say nothing about confidential or trade secret
 18 information. **Exhibit 8**. In addition, JLL does not describe the documents it seeks to withhold *at all*,
 19 much less in a manner that enables Switch to assess JLL’s claim. In fact, to the extent these
 20 communications between JLL and these parties contain trade secret information that also references
 21 Switch, such material would be relevant to this action, and merit the very discovery sought.
 22 Therefore, JLL should be compelled to produce the documents sought in the subpoena duces tecum.

23 **D. The subpoena is reasonably limited in time and subject matter and does not
 24 pose an undue burden.**

25 “A party or attorney responsible for issuing and serving a subpoena must take reasonable
 26 steps to avoid imposing undue burden or expense on a person subject to the subpoena.” Fed. R. Civ.
 27 P. 45(d)(1). “[T]he objecting party must provide specific facts that indicate the nature and extent of
 28 the burden.” *Scientific Games Corporation v. AGS LLC*, 2017 WL 3013251, at *2 (D. Nev., 2017).

1 JLL asserts that each request within the subpoena “is not reasonably limited in time or in
 2 subject matter, and, for that reason, is unduly burdensome.” **Exhibit 9**. However, the requests are
 3 reasonably limited in time and subject matter. The requests seek communications from 2011 to the
 4 present. **Exhibit 8**. This entire time period is relevant to the case—Fairfax toured Switch’s facility in
 5 2011 and at least one data center at issue opened in 2017. (ECF No. 1-1 at 12:20-21, 19:10-12).
 6 Additionally, JLL has continued to use Mr. Fairfax’s reputation (and knowledge) to sell Aligned’s data
 7 centers and does so today. Based on the recent opening of the data center and JLL’s on-going
 8 relationship with the entities at issue, it is clear that relevant communications, injury, and
 9 misappropriation are still being made.

10 In addition, Switch only seeks production of communications specifically dealing with Switch,
 11 further limiting the scope of production. Finally, JLL does not provide specific facts that indicate the
 12 nature and extent of its burden. Switch stated that it is willing to discuss search terms and hit results
 13 to address JLL’s burden concerns, but JLL failed to respond to Switch’s offer and continues to resist
 14 ANY production to date. **Exhibit 1; Exhibit 10**. Therefore, JLL should be compelled to produce
 15 the documents sought in the *subpoena duces tecum*.

16 **E. The discovery is not for an improper purpose.**

17 JLL asserts that Request Nos. 2-7 in the subpoena “appear[] to be for an improper purpose
 18 and [are] improper under Rule 45 and 26.” **Exhibit 9**. JLL does not clarify what Switch’s allegedly
 19 improper purpose is, though it seems JLL is concerned that Switch is only seeking information that
 20 will enable Switch to sue JLL in a subsequent case. **Exhibit 10**.

21 Under Federal Rule of Civil Procedure 26(g), by signing a discovery request, “an attorney or
 22 party certifies that to the best of the person’s knowledge, information, and belief formed after a
 23 reasonable inquiry...it is...not interposed for any improper purpose, such as to harass, cause
 24 unnecessary delay, or needlessly increase the cost of litigation.” Switch did not subpoena JLL to
 25 harass, cause unnecessary delay, or to needlessly increase the cost of litigation. Switch is not merely
 26 using the current action to attempt to build a future case against JLL. Switch reasonably believes that
 27 JLL has information that is relevant to the current case as described above. Therefore, JLL should
 28 be compelled to produce the documents sought in the subpoena duces tecum.

4. Conclusion.

Given JLL’s absolute refusal to provide any materials in response to the subpoena, despite Switch’s narrow tailoring of the subpoena, and repeated efforts to accommodate JLL’s concerns, the Court should grant Switch’s motion to compel and order JLL to produce documents in response to Switch’s subpoena duces tecum.

DATED this 20th day of March, 2020.

SWITCH, LTD.

/s/: *Samuel Castor*

SAMUEL CASTOR, ESQ.
Nevada Bar No. 11532
ANNE-MARIE BIRK, ESQ.
Nevada Bar No. 12330
7135 South Decatur Blvd.
Las Vegas, Nevada 89118

MARK A. HUTCHISON
Nevada Bar No. 4639
JACOB A. REYNOLDS
Nevada Bar No. 10199
PIERS R. TUELLER
Nevada Bar No. 14633
HUTCHISON & STEFFEN, PLLC
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to F.R.C.P. 5(b), I hereby certify that on this 20th day of March, 2020, I served a true and correct copy of the above document, entitled **PLAINTIFF'S MOTION TO COMPEL THIRD-PARTY JONES LANG LASALLE TO PROVIDE REQUESTED DOCUMENTS**, via the Court's electronic filing/service system (CM/ECF) to all parties on the current service list.

Marc J. Randazza, Esq.
Ronald D. Green, Esq.
Alex J. Shepard, Esq.
RANDAZZA LEGAL GROUP, PLLC
2764 Lake Sahara Drive, Suite 109
Las Vegas, NV 89117
ecf@randazza.com
mjr@randazza.com
rdg@randazza.com
ajs@randazza.com
Attorneys for Defendants

I further certify that a true and correct copy of the aforementioned document was served via electronic mail to the following:

Michael A. Berta, Esq.
Joseph Farris, Esq.
Arnold & Porter Kaye Scholer LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Michael.berta@arnoldporter.com
Joseph.farris@arnoldporter.com
Attorneys for Non-Party
Jones Lang LaSalle Incorporated

/s/: Tanya Paonessa

An agent of SWITCH, LTD.